

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Benjamin Cole,

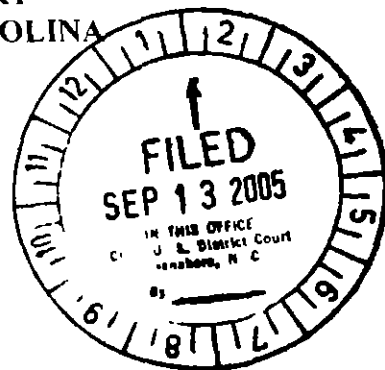
Petitioner,

v

State of North Carolina,

Respondent

1 05CV799



**ORDER AND RECOMMENDATION**  
**OF UNITED STATES MAGISTRATE JUDGE**

Petitioner, a prisoner of the State of North Carolina, has submitted a petition under 28 U S C § 2254 for writ of habeas corpus by a person in state custody. The Clerk of Court received the submission on August 16, 2005, which petitioner had dated as of August 3, 2005. For the following reasons, the petition cannot be further processed:

1. An insufficient number of copies was furnished. Petitioner must submit the original and two copies. [Attached instructions and Rule 3(a), Rules Governing § 2254 Cases.]
2. Filing fee was not received or affidavit to proceed in forma pauperis was not submitted or signed by the petitioner. [Attached instructions and Rule 3(a), Rules Governing § 2254 Cases.]

Because of these pleading failures, this particular petition should be filed and then dismissed, without prejudice to petitioner filing a new petition on the proper habeas corpus forms with the \$5.00 filing fee, or a completed application to proceed in forma pauperis, and otherwise correcting the defects noted. The Court has no authority to toll the statute of limitation, therefore it continues to run, and petitioner must act quickly if he wishes to pursue this petition. See Spencer v. Sutton, 239 F.3d 626 (4<sup>th</sup> Cir. 2001). To further aid petitioner, the Clerk is instructed to send petitioner a new application to proceed in forma pauperis, and new § 2254 forms.

In forma pauperis status will be granted for the sole purpose of entering this order of dismissal with permission to file a new petition which corrects the defects of the present petition

**IT IS THEREFORE ORDERED** that in forma pauperis status is granted for the sole purpose of entering this order. The Clerk is instructed to send petitioner Section 2254 forms, instructions, and a current application to proceed in forma pauperis.

**IT IS RECOMMENDED** that this action be filed, but then dismissed sua sponte without prejudice to petitioner filing a new petition which corrects the defects of the current petition.

/s/ P. Trevor Sharp  
United States Magistrate Judge

Date September 13, 2005